BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of: **MWE Services, Inc. dba Midwest Demolition Co.,** **Respondent.**	**Docket No. FMCSA-2007-27030[1]** **(Midwestern Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

1. Background

On October 24, 2006, the Nebraska Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, MWE Services, Inc. dba Midwest Demolition Co., proposing a civil penalty of $6,000 for one violation of 49 CFR 386.83(a)(1) – operating a commercial motor vehicle in interstate commerce during a period when the carrier has been prohibited from operating for failure to pay a civil penalty. The Statement of Charges section of the Notice of Claim said that Respondent was prohibited from operating in interstate commerce effective May 5, 2004, pursuant to the Order to Cease Operations issued on April 23, 2004, to Zapata Inc, dba Midwest Demolition Company."[2]

On November 16, 2006, Respondent replied to the Notice of Claim, denying the charge and requesting a formal hearing. Respondent denied that the Order to Cease Operations (Order to Cease) issued to Zapata, Inc. dba Midwest Demolition Co. (Zapata), has any relation or otherwise would apply to Respondent. It denied that it was or is the

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[1] The prior case number of this matter was NE-2006-0099-US0851.

[2] See Exhibit 1 to "Field Administrator's Objections to Respondent's Request for Hearing" (Claimant's Objections to Hearing).

same entity as Zapata, that it has the same DOT number as Zapata, and alleged that it did not have the same officers and shareholders as Zapata. It further alleged that Claimant did not inform it that the Order to Cease applied to Respondent. It contended that Claimant had waived his right to assert that the Order to Cease is effective against or should be applied to Respondent.[3]

On January 22, 2007, Claimant, the Field Administrator for the Midwestern Service Center, FMCSA, submitted his "Objections to Respondent's Request for Hearing" (Claimant's Objections to Hearing). In it, he stated that the evidence documented by the Nebraska Division establishes that Respondent and Zapata "are merely one continuing motor carrier enterprise." Counsel gave notice of Claimant's intent to file a motion for final order. More than three years later, however, no motion for final order has been filed.

On March 9, 2007, Respondent submitted a response to Claimant's Objections to Hearing. It argued that Claimant did not set forth the basis for asserting that Zapata and Respondent are one continuing motor carrier enterprise. It also contended that Claimant failed to respond to the factual allegations and affirmative defenses in Respondent's Reply.

2. Discussion

Claimant has taken an inordinate amount of time since the filing of his objection to a hearing without having submitted the required motion for final agency order. Although the Agency's Rules of Practice do not provide a deadline for filing a motion for final agency order, Claimant does not have an indefinite amount of time in which to do

[3] See Exhibit 2 to Claimant's Objections to Hearing.

so. In fact, previous orders have informed Claimant of my interpretation of the revised Rules of Practice on this issue. On July 6, 2009, I found:

> Although the revised rules of practice do not provide a deadline for the filing of a Motion for Final Order following an objection with basis to a request for a formal hearing, Claimant's objection with basis should have enabled Claimant to submit his Motion for Final Order within a reasonable amount of time. Claimant's objection with basis was filed more than three years ago. One of the stated goals of the Agency is to "prevent cases from falling through the cracks due to lags in procedural responses." [Footnote omitted.][4]

Because that was the first case in which this issue was discussed, I allowed Claimant 30 days in which to submit either a Motion for Final Order or the status of the proceeding. Later that same month, in a case in which nearly two years had elapsed since Claimant had objected to a hearing without submitting a Motion for Final Order, I found that: "Claimant knew or should have known at the time he submitted his objection what the arguments would be in a forthcoming … motion for final order; accordingly, he should have been able to submit [it] in a reasonable amount of time."[5] Because our goal of preventing cases from falling through the cracks due to lags in procedural responses had not been achieved in that matter, an administrative law judge was appointed. Although that case involved both an improper objection to the request for hearing as well as the elapse of nearly two years since the objection, Claimant has been on notice for more than eight months that a lengthy delay in the submission of a Motion for Final Order is unacceptable.

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[4] *In the Matter of White Farms Trucking, Inc.*, Docket No. FMCSA-2006-24146, Order, July 6, 2009, at 3-4.

[5] *In the Matter of K & P Trucking, Inc. dba Ken Pratt Trucking*, Docket No. FMCSA-2007-0027, July 17, 2009, at 4.

Notwithstanding this notice, Claimant has yet again delayed submitting his Motion, this time for more than three years. The delay is inexcusable.[6] After all, had Respondent stated that it intended to submit written evidence without a hearing, Claimant would have been required to submit his evidence no later than 60 days following service of Respondent's reply. A Motion for Final Order is essentially the submission of Claimant's evidence with argument as to why a formal hearing is not warranted. Because the basis for that argument had already been set forth in the objection, Claimant should have needed little more than the 60 days provided by regulation for the submission of evidence.[7] In any event, 38 months since the submission of the objection is not even close to reasonable. Therefore, this matter is being forwarded to the U.S. Department of Transportation's Office of Hearings.

Moreover, the record already reflects a material issue of fact in dispute, namely whether Respondent is the corporate successor to Zapata.[8] In addition, there is the issue of whether the Notice of Claim meets the requirements of a charging document. As Respondent pointed out, nowhere in the Notice of Claim does the Division Administrator allege that Zapata and Respondent are one continuing motor carrier enterprise. All he stated was that Respondent was prohibited from operating in interstate commerce based on an Order to Cease issued to Zapata.

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[6] FMCSA will soon publish an interpretive rule setting forth the time frame following the submission of a proper objection with basis to a request for a hearing in which the Motion for Final Order must be submitted.

[7] See 49 CFR 386.16(a)(1).

[8] That this is so obviously a question of fact in dispute warranting the appointment of an administrative law judge leads me to wonder why Claimant would submit an objection.

3. Appointment of Administrative Law Judge

In accordance with 49 CFR 386.54, an administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter and render a decision on all issues, including the civil penalty, if any, to be imposed. The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the revised Rules of Practice, and all orders issued by the administrative law judge.

It Is So Ordered.

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4-9-10
Date

CERTIFICATE OF SERVICE

This is to certify that on this 12 day of April, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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The Honorable Ronnie A. Yoder Chief Administrative Law Judge Office of Hearings, M-20 U.S. Department of Transportation 1200 New Jersey Avenue, S.E. East Building Ground Floor Room E12-320 Washington, D.C. 20590	One Copy Personal Delivery

FMCSA-2007-27030

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